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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STEARNS COMPANY and
RAMEX MINING CORPORATION, - - Petitioners,

versus

DONALD P. HODEL, Secretary of the Interior;
JED CHRISTENSEN, Acting Director, Office of Surface Mining Reclamation and Enforcement;
W. HORD TIPTON, Lexington Field Office Director, Office of Surface Mining Reclamation and Enforcement, - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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10 pp

QUESTIONS PRESENTED

I. Whether 30 U.S.C. § 1272(e)(2), a special provision of the Surface Mining Control and Reclamation Act of 1977 which restricts the mining of federally owned coal in the national forests, can be interpreted as also restraining the mining of privately owned coal, when the United States owns the accompanying surface estate, even though such a scheme (a) would be contrary to the provision's language and legislative intent and (b) would disrupt the long-standing property law principles of virtually every state in the union.

II. Whether 30 U.S.C. § 1272(e)(2) should be construed to apply to private mineral estates in the national forests (but only where the United States owns the surface estate) when such a construction would not be a constitutional exercise of power by the Congress under either the Commerce Clause or the Property Clause.

III. Whether 30 U.S.C. § 1272(e)(2) should be construed to apply to privately held mineral estates within the boundaries of the national forests (but only where the United States owns the surface estate) when such a construction (a) would result in the United States acquiring from private mineral owners property rights not initially bargained for and (b) would completely disrupt the usage and free transfer of privately held mineral rights located within the boundaries of the national forests.

OTHER PARTIES NOT LISTED IN THE CAPTION

None. Pursuant to Rule 40.3 of the Rules of this Court, the current federal public officers have been substituted as Respondents for those former federal officials who were parties in the proceedings below. Appellees in the Sixth Circuit were James G. Watt, Secretary of the Interior; Paul Reeves, Acting Director, Office of Surface Mining Reclamation and Enforcement; and David C. Short, Director, Region II, Office of Surface Mining Reclamation and Enforcement.

STATEMENT PURSUANT TO RULE 28

28.1: Corporate Affiliations: The Stearns Company has no parent corporations or affiliates, and all its subsidiaries are wholly-owned. Ramex Mining Corporation has no parent corporation nor does it have any subsidiaries.

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THE STEARNS COMPANY and
RAMEX MINING CORPORATION, - - *Petitioners,*

v.

DONALD P. HODEL, Secretary of Interior;
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W. HORD TIPTON, Lexington Field Office Director, Office of Surface Mining Reclamation & Enforcement - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, The Stearns Company and Ramex Mining Corporation, respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit presenting important issues of statutory construction and constitutional law under Section 1272(e)(2) of the Surface Mining Control and Reclamation Act of 1977.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix 1 hereto) is reported at 753 F. 2d 521. The Judgment is reprinted as Appendix 4 hereto.

2. The November 3, 1981 Memorandum Opinion of the United States District Court for the Eastern District of Kentucky granting the defendants below (respondents) a partial summary judgment is not reported. It is, however, reprinted as Appendix 2 hereto.

3. The April 1, 1983 Memorandum Opinion of the United States District Court for the Eastern District of Kentucky denying petitioners' motion for reconsideration of the court's November 3, 1981 Memorandum Opinion is not reported. It is, however, reprinted as Appendix 3 hereto.

JURISDICTION

The opinion of the Court of Appeals was rendered on January 29, 1985. Thereafter, a timely petition for rehearing en banc was denied by order of the Court of Appeals (Appendix 5 hereto) on March 15, 1985. This petition for writ of certiorari was filed within 90 days of the order denying the petition for rehearing.

This Court's jurisdiction is invoked by petitioners pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Commerce Clause, United States Constitution, Article I, Section 8, Clause 3.

2. The Property Clause, United States Constitution, Article IV, Section 3, Clause 2.

The constitutional provisions are reprinted in Appendix 5 hereto.

STATUTORY PROVISIONS INVOLVED

This case involves Sections 1272(e)(2) and 1291(4) of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201-1328 (1983). Pertinent parts of the statute are reprinted in Appendix 6 hereto.

STATEMENT OF THE CASE

I. Introduction

This case of first impression places before this Court a question of national importance: whether 30 U.S.C. §1272(e)(2), a special provision of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201-1328 (hereinafter Surface Mining Act), which places specific restrictions on the mining of federally owned coal in the national forests, also applies to prohibit or to restrict the mining of privately owned mineral estates, located within the boundaries of such forests, whenever and solely because the federal government owns the surface estate. The statute reads:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . .
>
> (2) *on any Federal lands within the boundaries of any national forest:* Provided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other

> values which may be incompatible with such surface mining operations and—
>
> A. Surface operations and impacts are incident to an underground coal mine. [Emphasis added.]

Under this Act, unless a party has "valid existing rights," surface mining of coal "on any Federal lands" is prohibited, and deep mining is likewise prohibited unless the person desiring to mine the coal can persuade the Secretary to rule that the surface impacts of the proposed deep mine are "compatible" with "recreational, timber, economic or other values."

The petitioners contend that Section 1272(e)(2) does not apply to their private mineral estates located in the Daniel Boone National Forest and that, in enacting this provision, Congress did not intend to exceed its constitutional authority by unilaterally enhancing the United States' rights in the surface estate by placing in the government "dominion" over private property interests not previously bargained for. On the other hand, the United States Department of Interior, Office of Surface Mining (OSM) takes the position that this statute authorizes it to take dominion of the petitioners' privately owned mineral estate wherever the acompanying surface estate is owned by the United States, and to impose prohibitions and restrictions on the use of the minerals beyond those generally applicable under the Surface Mining Act.[1]

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[1]This case does not involve a challenge to any of the general mining or reclamation provisions contained in the Surface Mining Act. Stearns and Ramex recognize that any mining activity undertaken must be conducted in compliance with the Act.

The lower courts have not addressed the specific legal arguments made by the petitioners; rather, the courts have purported to rely upon "common sense" to dismiss the petitioners' arguments. (See Appendix 1 at p. 5a and Appendix 2 at 14a.) However, the courts' "common sense" interpretation of what constitutes "Federal lands" cannot substitute for the statutory definition, a definition which was *not* discussed by the lower courts. 30 U.S.C. § 1291(4) defines the term "Federal lands" as "lands including mineral interests, *owned* by the United States." (Emphasis added.) This definition recognizes that Congress meant to limit the application of Section 1272(e)(2) to those lands in which the United States has a proprietary interest in the minerals, rather than have it apply to lands owned by private individuals. The petitioners respectfully suggest that the lower courts' "common sense" rulings are wrong[2] and not in accordance with the definition contained in Section 1291(4).

The petitione s are asking this Court to review the lower courts' rulings, for, if allowed to remain, they

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[2]A layman's view of "common sense" might well be that mining should be prohibited within the boundaries of a national forest. However, to determine whether Congress intended to prohibit the mining of these interests, the scope and purpose of Section 1272(e)(2) must be examined through an analysis of its terms and legislative history. The petitioners submit that if Congress truly intended to restrict private mining in the national forests, it would have done so directly, through its powers of eminent domain, with appropriate compensation being paid for the mineral interests.

will unsettle the property laws of Kentucky (and most every other state); will fundamentally alter the relative property interests existing when both federal and private ownership exists in the same parcel of land; and will give Congress much broader authority than is currently permitted under the United States Constitution.

II. Statement of Facts

Prior to 1937, The Stearns Company (Stearns) acquired fee simple ownership of a tract of land in McCreary County, Kentucky. In 1937, Stearns conveyed the surface estate in the tract to the United States for $2.85 per acre, the acquisition having been authorized under the Weeks Act, 16 U.S.C. § 578. Under the deed, Stearns reserved the mineral estate and consequently had the unqualified right to deep mine its coal. In fact, Stearns exercised this right on many occasions—as did other mineral owners who had conveyed the surface estate to the United States. This extraction was authorized since, under Kentucky law, the interests of a mineral estate owner *include* the right to utilize so much of the surface as is reasonably necessary to extract the coal. This right to mine without asking for the consent of the surface owner constitutes the *essence* of mineral ownership! If a mineral owner cannot extract his minerals without the permission of the surface owner, he truly does not own the minerals, the surface owner does.

In 1977, Congress passed the Surface Mining Act, which generally undertook to regulate surface mining.[3] In addition, though, Section 1272(e)(2) of the Act placed specific limitations on the extraction of federally owned coal by either the surface mining or deep mining methods. Since 1977, OSM has interpreted Section 1272(e)(2) to mean that, even though the United States owns no interest in the mineral estate, the rights of the mineral owner cannot be exercised without the review and approval of OSM.

In 1980, Stearns leased a portion of its mineral interests in McCreary County to Ramex Mining Corporation (Ramex). After this lease, Ramex attempted to open an underground mine on a 2.62 acre tract. Before mining operations commenced, however, Ramex was advised that OSM considered Ramex's proposed mining activities to be subject to Section 1272(e)(2), and that Ramex would have to comply with the provisions of that Section before any mining operations could begin. The Secretary further warned that penalties would be imposed if Ramex attempted to engage in any of the activities otherwise permitted under its lease from Stearns. As a result of this threat of sanction, no mining has occurred.

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[3]Surface coal mining operations, as defined in the Act, include "surface impacts incident to an underground coal mine". 30 U.S.C. 1291(28). Hence, the broad mining and reclamation provisions of the Act apply fully to the surface aspects of the deep mine proposed by Stearns and Ramex.

III. Proceedings Below

On January 20, 1981, in the United States District Court for the Eastern District of Kentucky, Ramex filed this action for declaratory judgment (28 U.S.C. § 2201) seeking a determination that the Secretary has no authority under Section 1272(e)(2) to restrain or to impose sanctions against Ramex's proposed mining activities. Jurisdiction was based on 28 U.S.C. § 1331, as well as 28 U.S.C. § 1361. Stearns then intervened as a party plaintiff, and both moved for summary judgment, while the United States moved to dismiss the plaintiffs' complaint. On November 3, 1981, the district court overruled the plaintiffs' motion for summary judgment and, without analyzing the terms or intended scope of Section 1272(e)(2), sustained the government's motion to dismiss on "common sense" grounds. (See Appendix 2 at p. 14a). The ruling was affirmed on April 1, 1983 after the petitioners requested the lower court to reconsider its ruling.

Stearns and Ramex appealed to the United States Court of Appeals for the Sixth Circuit seeking to have a determination of (1) whether Section 1272(e)2) could be extended to apply to their proposed deep mine operations; and, if so, (2) whether such extension was within the Constitutional powers of Congress. The Sixth Circuit, however, ruled as did the district court that the "common sense" meaning of the statute brought the petitioners' mineral interests within its terms (See Appendix 1 at p. 5a.) and that the petitioners' "taking" claim (a claim which was never made) was not ripe. (See Appendix 1 at p. 6a).

Stearns and Ramex petition this Court for issuance of a writ of certiorari to permit this case to be ultimately decided not on a court's perception of "common sense", but instead on a legal determination of whether Congress, in enacting 30 U.S.C. § 1272(e)(2), empowered the federal government to obtain dominion over thousands of acres of privately owned mineral interests solely because of the federal government's ownership of the accompanying surface interests, and, if so, whether such an act was within the powers of Congress under the United States Constitution.

REASONS FOR ALLOWANCE OF WRIT

Argument I

Unless Reviewed by This Court, the Lower Court's Construction of 30 U.S.C. § 1272(e)(2) Will Judicially Expand the Scope of the Statute and Will Invert Long-Standing Principles of State Property Law.

The rulings of the trial court and the Sixth Circuit, if left unreviewed will adversely affect the fundamental rights of numerous private property owners, large and small, holding mineral estates in the national forests. Yet these rulings are contrary to the plain language and legislative history of Section 1272(e)(2), and eviscerate the well-established precepts of property law upon which mineral and surface estate owners alike have long relied. Accordingly, review by this Court is imperative to remedy a situation which, if left to stand, will bring national chaos to the formerly well-ordered relationship between the owners of surface and mineral estates.

The petitioners raise two challenges to the lower courts' interpretation of Section 1272(e)(2). First, this provision, by its express terms, does not remotely purport to regulate privately held mineral estates, nor does the legislative history support such an interpretation. Second, under Kentucky law, a mineral estate *includes* the unqualified right to go onto the physical surface of the land for purposes of removing the coal in a reasonable manner. Thus, when the owner of a mineral estate goes "on" the physical surface to remove the coal, he is "on" his own land, not just the land of the surface owner. These arguments simply were not meaningfully addressed by the lower courts.

A. Section 1272(e)(2) and Its Legislative History.

30 U.S.C. § 1272(e)(2) was enacted solely for the purpose of restricting the mining of federally owned coal. The provision relates only to mining "on any Federal land", and the term "Federal land" is defined as "any land, including mineral interests, owned by the United States." 30 U.S.C. § 1291(4). Thus any land containing federal minerals falls within the Section's terms. However, it is impossible to read into this definition any intent on the part of Congress to regulate mineral interests "owned" by private individuals. If Congress had such an intention, the definition surely would have been drafted much differently. For example, the Section could have been drafted to apply to "all federal land and all private mineral lands where the federal government owns the surface estate." This is the way OSM and the lower

courts have applied the definition of the term "Federal lands" — but there is absolutely no legislative history to support such an interpretation. Indeed, the Senate Committee Report, S. Rep. No. 128, 95th Cong., 1st Session (1977) declares at p. 56:

> Since the mining of coal became a profitable enterprise, there have been numerous instances in which the mineral estate and the surface estate were separated, both on public and private lands. State laws govern the resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such State laws. . . .
>
> *However, with regard to lands where the Federal government owns the coal, but not the surface estate, the bill does provide for some departure from existing practice.*

This legislative history declares that Section 1272 (e)(2) was intended to apply only to federally owned coal, and that state law was to govern situations where a private party owned the coal. This conclusion is buttressed by the complete absence in the provision of any reference to the special circumstances created when privately owned minerals are involved! Surely if Congress had intended to prohibit or to restrict the rights of private mineral owners careful and detailed provisions would have been enacted to advise the private owners of their rights, and to provide compensation to such owners if the "regulation" constituted a "taking" under the Fifth Amendment to the United States Constitution. But Congress did *not* include any

such provision because the section applies only to federally owned coal. OSM is simply attempting to expand the limited scope of Section 1272(e)(2) to areas not encompassed by the statute. *See Office of Consumer's Counsel* v. *Federal Energy Reg. Com'n,* 655 F. 2d 1132 (D.C. Cir. 1980) (it is not for an administrative agency to "fill in" where it believes federal action is needed); *Talley* v. *Matthews,* 550 F. 2d 911 (4th Cir. 1977) (agency is no more authorized than courts to rewrite acts of Congress).

Extremely valuable property rights are at stake here — and they should be subject to *lawful* regulation only when the Congressional intent to do so is obvious and direct. *See Interstate Commerce Com'n* v. *Cincinnati, N.O. & T.P.R. Co.,* 167 U. S. 479 (1896). Such is not the case here, though, as the following discussion from the legislative history demonstrates:

> Mr. Udall. Mr. Chairman, we attempt to deal, in Title VII of this bill, with this whole problem of surface-owner consent. There are cases in which private people own the land and the Government owns the coal underneath. There may be a few instances where that is reversed, where the Government owns the land and the private people own the coal underneath.
>
> Mr. Miller of Ohio. There are instances of such.
>
> Mr. Udall. *We do not attempt to deal with that situation.* We have no constitutional right to upset the rights of private property owners in that regard. I do not believe we can take away from the private coal owners whatever rights they

> now have against the U.S. Government. (emphasis added.)

Cong. Rec. H. § 3757 (1977) (emphasis added).

Perhaps Representative Lujan said it best:

> "[I]n the establishment of the national forest system in many areas of the country, grantors sold land to the United States government for inclusion in a national forest, but reserve mineral rights for themselves. . . . The language of Section 522(e) itself, the thrust of the report discussion and common sense all dictate that the only logical interpretation of Section 522(e)(2) is that the enactment of this legislation does not disrupt the relationship between the owner of the coal and the Federal government.
>
> I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, for the Forest Service (or anyone else) to argue that the Surface Mining Control and Reclamation Act somehow modifies the relationship between the owner of the surface and subsurface rights. Clearly, alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right to mine the coal in any way modified if such right existed prior to the enactment of the Act.

H.R. Rep. No. 218, 95th Cong., 1st Sess. . . ., *reprinted in* 1977 U.S. Code Cong. and Admin. News 593, 718.

This legislative history cannot be more clear. The intent of Congress in enacting Section 1272(e)(2) was to regulate federally owned coal; there was no intention to interfere with the rights of private mineral estate

owners to extract their coal under state law. Consequently, the attempt by OSM to apply Section 1272 (e)(2) to the petitioners' privately owned minerals (a risk perceived by Rep. Lujan) constitutes an unlawful expansion of the statute which should be reviewed and rejected by this Court.

B. Section 1272(e)(2) and State Property Law.

If not reviewed, the Sixth Circuit's decision will visit chaos upon the long-established ordering of property interests under the laws of Kentucky and other jurisdictions. Under traditional property law principles, a mineral estate includes the ultimate and paramount right to use all of the land, *including the physical surface,* to the extent necessary to conducting a legitimate mining operation. As stated in *Central Kentucky Natural Gas Co.* v. *Smallwood,* 252 S. W. 2d 866 (Ky. 1953): "[T]he right to a reasonable and necessary use of the surface for exploration and production is *always* implied in a grant or reservation of minerals. 252 S. W. 2d at 869 (emphasis added). And in *United Carbon Co.* v. *Webb,* 282 Ky. 79, 137 S. W. 2d 733 (1944), the court said that the mineral owner has the:

> . . . paramount right to use the surface in developing minerals for any purpose deemed necessary and convenient in his judgment, and so long as he does not use his power arbitrarily, oppressively or maliciously, he will not be held liable in damages to the owner of the surface.

See also Jenkins v. *DePoyster,* 299 Ky. 500, 186 S. W. 2d 14 (1945).

These Kentucky cases unequivocally establish that the surface estate does not carry with it any right which would in any way permit the surface owner to impair or impede the mineral owner's exercise of his lawful right to remove the coal.[4] That is to say, when a mineral owner comes "on" the physical surface to begin mining operations, he is not interfering with the utilization of the surface estate. Instead, he is on his own property since he owns all the legal rights necessary to enter onto the *physical* surface and mine in it or through it. Legislation designed to alter these property relationships has been held to be unconstitutional. *See Department for Natural Resources and Environmental Protection* v. *No. 8 Limited of Virginia,* 528 S. W. 2d 684 (Ky. 1975).

C. Consequences of OSM's Approach.

If Section 1272(e)(2) were to be applied to privately held mineral estates, overwhelming burdens would be imposed upon the owners of such estates and the existing system of property rights would be thrown into total disarray. The effect upon Stearns in this case exemplifies and dramatizes these consequences. Prior to 1977, Stearns had exercised its mineral rights in the national forests in full conformity with the

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[4]The federal courts have long recognized these fundamental relationships of property law. *See, e.g., Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488 (1928).

standards imposed by state and federal law. Since 1977, though, because of OSM's erroneous interpretation of Section 1272(e)(2), no such mining has taken place. Moreover, if that interpretation is correct, it is certainly conceivable, for at least two reasons, that no mining activity will ever occur: First, the likelihood of prevailing in a proceeding before a hostile administrative agency such as OSM, which has a vested interest in the outcome, is speculative at best.[5] Second, if the

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[5]For example, the agency's proposed regulations on "valid existing rights" are currently in a state of chaos as the agency continues its attempt to impose the most stringent standards possible against private mineral owners. A review of the history of "valid existing rights" regulations is intriguing. OSM's first promulgation, the "all permits" test, declared that if an individual had obtained all of his permits from the federal government prior to the enactment of Section 1272(e)(2), he could go ahead and mine. See 30 CFR §761.5 (1979). This meant that a lessee of the federal government's mineral estate could mine if he had already completed the permitting process; otherwise, he could not surface mine and could deep mine only by receiving a "compatibility" determination. However, once this regulation was promulgated, OSM applied it to privately held minerals as well. Later, the "all permits" test was withdrawn and a "taking" regulation was promulgated. See 30 CFR §761.5 (1983). This provided that only when the application of Section 1272(e)(2) constituted a "taking" did there exist valid existing rights. This assured OSM of the ability to apply the most stringent restrictions conceivable, compel a court battle, and then avoid a "taking" by having valid existing rights apply in the first place if such a "taking" is found. This regulation has now been withdrawn in accordance with the District Court's ruling in *In Re Permanent Surface Mining Regulation Litigation*, Civ. Action No. 79-1144 (D. D.C. March 22, 1985). Thus, eight years after the statute, if a private mineral owner were to decide to apply for valid existing rights, he would have no place to go, no guidelines to follow, and no hope of success.

petitioners are compelled to comply with the totally subjective "compatibility" provision of Section 1272 (e)(2), they will have lost dominion over their mineral estate. Thus, if held to apply to the petitioners' mineral estate, the provisions of Section 1272(e)(2) will virtually nullify their ownership interest altogether.[6] *Yet the extent of the regulation of Section 1272(e)(2) is not the issue in this case; rather, the issue is whether the Section applies to private mineral estates in the first instance.* The petitioners maintain that the Section's terms and legislative history are fully consistent with universally accepted property law principles which declare that a surface owner does not have the authority to regulate or to interfere with the lawful extraction of minerals by the mineral estate owner. Any contrary interpretation (1) would have the legal effect of violating these principles, ignoring legislative history and infringing upon constitutional limitations; and (2) would have the practical effect of depriving the petitioners of their most valuable property right—dominion over their mineral interests. This Court should accept review of this case to assure that the construction of Section 1272(e)(2) does not abridge these legal tenets.

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[6]A prospective buyer would have no interest in acquiring mineral interests in which the surface owner has the power of consent—hence, the existing mineral interest would be rendered valueless.

Argument II

Unless Reviewed by This Court, the Lower Courts' Application of 30 U.S.C. § 1272(e)(2) Will Obscure the Distinction Between Congress' Power Under the Commerce Clause and Congress' Power Under the Property Clause of the United States Constitution.

For the constitutional authority for Section 1272 (e)(2), both courts erroneously relied upon the holding in *Hodel* v. *Virginia Surface Mining and Reclamation Assoc.*, 452 U. S. 264 (1981). The district court improperly interpreted *Hodel* as providing constitutional authority for the special regulation of private mineral estates in the national forests; the Sixth Circuit used *Hodel* to dismiss a "taking" argument which the petitioners never made. However, *Hodel* simply has no application to the issue presented here. That case upheld the *general* provisions of the Surface Mining Act as a valid exercise of power under the Commerce Clause.[7] But the Supreme Court in *Hodel* specifically refused to consider the validity of the *special* regulation in Section 1272(e)(2) because of the lack of a justiciable controversy (no party in that action owned land to which that section would apply). *Id.* at 294. *Indeed, the Court was waiting for a case such as this one to interpret Section 1272(e)(2)!*

If the Sixth Circuit's opinion remains unreviewed, Congress will have received legislative authority from

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[7]The Commerce Clause, U. S. Const. Art. I, §8, cl. 3 provides that "The Congress shall have the power to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."

the judiciary far in excess of that permitted under the United States Constitution. Congress is permitted under the Commerce Clause to regulate private interests which generally "affect" interstate commerce, (*See Heart of Atlanta Hotel, Inc.* v. *United States,* 379 U. S. 247 (1964); *Katzenbach* v. *McClung,* 379 U. S. 294 (1964); and under the Property Clause[8] Congress may enact specific legislation governing the acquisition, maintenance and disposition of its own property. *United States* v. *City and County of San Francisco,* 310 U. S. 16 (1940). Thus, the United States government wears two hats — the hat of a sovereign government and the hat of a property owner. *Kleppe* v. *New Mexico,* 426 U. S. 529 (1976); *State of Alabama* v. *State of Texas,* 347 U. S. 272 (1954); *Light* v. *United States,* 220 U. S. 523 (1911). But the government can only wear one hat at a time; indeed, the United States as a sovereign cannot restrict private property in order to enhance the value of property acquired by the United States solely in its proprietary capacity. This is to say, Congress is not permitted to blend its powers under the Commerce Clause and the Property Clause so as to permit it to enhance a specific government property interest through a statute which in fact has no interstate basis.

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[8]The Property Clause, U. S. Const. Art. IV, §3, cl. 2 provides "The Congress shall have power to dispose of and make all needful rules and regulations affecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

See Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 (1935). Yet this is precisely the effect of Section 1272(e)(2) as interpreted by the lower courts.

The power of Congress to regulate private property under the Property Clause is limited *solely to the protection of federal property. Kleppe* v. *New Mexico, supra.* However, the attempted "regulation" of private minerals in this case does not in any way "protect" the surface estate owned by the United States. *Instead, such surface estate, by definition, is subject to the rights of the private mineral estate, and it cannot be affected or harmed by the occurrence of the activity to which it is subject.* As a consequence, the federal surface estate has no right to be protected from the effects of mining; and the purported regulation of private mining under Section 1272(e)(2) cannot be justified under the Property Clause.

The supposed regulation of private mining in Section 1272(e)(2) likewise cannot be considered to be an exercise of power under the Commerce Clause because the Section does not impinge in an equal way on all persons similarly engaged in interstate commerce. This is because the restrictions of Section 1272(e)(2), as interpreted to date, would not apply to coal producers based upon their interstate character or influence, but would instead apply to private mineral owners in the national forests *only* when, and *solely* because, the surface estate is owned by the United States. Consequently, identical operations on opposite sides of a property line would be treated differently if the federal government owned the surface

interest in one tract and not the other. Such a regulation clearly is not legitimate, though, for it is based solely upon the government's proprietary interest in the surface, and not upon any interstate commerce concerns. Thus, if interpreted as OSM suggests, Section 1272(e)(2) cannot be based on the Commerce Clause as its purpose would be to enhance the government's own property interest.

The petitioners submit that 28 U.S.C. § 1272(e)(2) should be construed to avoid these constitutional problems and that, if such construction is not possible, the statute be declared unconstitutional as applied to the regulation of private mineral estates.

Argument III

Unless Reviewed by This Court, the Lower Court's Interpretation of Section 1272(e)(2) Will Permit the United States to Unilaterally Enhance Its Property Rights and Will Frustrate the Free Transfer of Mineral Rights Located Within the Boundaries of the National Forest.

If the Sixth Circuit's opinion is not reviewed and reversed, the United States will have received authority to unilaterally conscript property rights which the government initially chose not to purchase. The government acquired its surface interest in its *proprietary* capacity and thus stood in the shoes of any other landowner. Then, in 1977, acting in its *sovereign* capacity, the government enacted 30 U.S.C. § 1272(e)(2) which, according to OSM, would require the petitioners to seek approval from the government prior to exercising their right to mine. Thus, under this read-

ing of the statute, the "dominion" over the mineral estate would shift from the private mineral owner to the surface owner solely because the surface owner is the United States government. Should this be permitted, untold harm would befall the private owners of existing property interests and a cloud would be placed on all transactions occurring within the boundaries of the national forest.

The maps of the Daniel Boone National Forest show that extensive private holdings exist within the overall proclamation boundaries. In some instances, a single private owner owns both the surface and the minerals, and in other instances separate private owners own the surface and the mineral estate. Under OSM's interpretation of Section 1272(e)(2), the free transferability of all of this land will be hindered.

Consider the situation where a private owner currently owns both estates. Under OSM's interpretation of the statute, this mineral owner would never be willing to sever his estates. This is because, once severance occurs, the mineral estate owner becomes subject to the whims of the surface owner. For example, if the initial grantee of the surface estate is the federal government, the mineral estate owner will have immediately lost dominion over his estate. Furthermore, even if the initial surface owner is a private individual, a mineral owner could not risk making an investment of the magnitude necessary to mine his coal because the private surface owner could defeat this right simply by conveying the surface estate to the federal govern-

ment.[9] Thus, unless the Sixth Circuit's opinion is reviewed and reversed, thousands of acres of extremely valuable privately owned mineral estates located within the boundaries of the national forests will have been rendered virtually worthless.

Of course, the import of the Sixth Circuit's opinion extends much further than the national forest. If the United States, acting in its proprietary capacity, can acquire a single interest of land in the national forest and then, acting in its sovereign capacity, extend and enhance this interest through regulation to the detriment of the remaining owners, then the government can so act with regard to any ownership interest anywhere. For instance, the government could establish a new national park area, purport to acquire only the surface estate for the park, and then legislate such restrictions on the remaining property interests so as to significantly or totally devalue them. Another example would be the acquisition by the government of one floor of a building followed by such regulation of the surrounding floors as to make them untenantable by anyone other than the United States. The examples are endless—and they demonstrate clearly and precisely the error in the Sixth Circuit's analysis of the application of Section 1272(e)(2).

OSM and the lower courts have said that the injury highlighted by these examples is avoided by the provi-

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[9]This is precisely what occurred in the case which was a companion to this one below, *Gabriel Energy Corp.* v. *James G. Watt, et al.*, Docket No. 82-18.

sion of the statute which makes its terms "subject to valid existing rights."[10] However, this answer is not only superficial, it is wrong. The sole issue in this case is whether Section 1272(e)(2) is applicable at all to the petitioners' privately held mineral interests. This question, by definition, precludes the proposed "valid existing rights" answer because that provision does not come into play *unless* the act otherwise applies to such privately held minerals. Of course, if Section 1272(e)(2) applies as the government suggests, the petitioners still might be able to mine by obtaining an administrative or judicial determination of "valid existing rights," but the requirement of making this showing is contrary to the terms of statute, legislative intent and case law. Quite simply, the petitioners should not be required to jump through this hoop because the statute does not apply to them in the first place.

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[10]The petitioners maintain that a vested property right such as their private mineral reservation constitutes a judicially determined "valid existing right" so that Section 1272(e)(2) could not apply to them. This is established by the declaration of Congress that OSM shall not have the power to adjudicate disputes over property rights, 30 U.S.C. §§ 1257(b)(9) and 1260(b)(6)(c). Additionally, the Committee on Interior and Insular Affairs explained that the "language 'subject to valid existing rights' in section 522(e) is intended . . . to make clear that the prohibition of strip mining on the national forests is subject to previous *court interpretations* of valid existing rights." (Emphasis added.) H.R. Rep. No. 218, 95th Cong., 1st Sess. 2, *reprinted in* 1977 U. S. Code Cong. & Admin. News 593, 631-32.

Argument IV

The Facts of This Case Present the Opposite Side of the Coin from *United States* v. *Locke*, — U. S. —, 105 S. Ct. 1785 (1985), and Provide This Court With the Opportunity to Designate Whether a Federal Agency Can Expand, by Administrative Interpretation, the Scope of a Statute Intended by Congress to Have Only Limited Application.

On April 1, 1985, this Court, in a 6-3 opinion, decided *United States* v. *Locke*, —— U. S. ——, 105 S. Ct. 1785 (1985)—a case in which an unpatented mining claim was held to have been lost because of the failure of its owner to comply with the filing requirement of Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744. Basically, that case required the Court to construe the language of Section 314 through a consideration of its terms, its legislative history and common law; and then to determine whether the Section imposed any impermissible constitutional infringements against property rights. This is precisely the approach which the petitioners propose to be taken in the instant case—but the facts of this case compel a decision completely different from that reached in the *Locke* case. Indeed, instead of an agency imposing a strict reading of an arguably unambiguous statute against a possessor of federally owned minerals, here the agency is attempting to expand the language of an apparently imprecise statute against an independent owner of privately owned minerals. The intent of the agency is the same in both cases — to stop mining; but the principles and policies enunciated in *United States* v. *Locke*, both in the ma-

jority and in the dissent, fully demonstrate that the government cannot construe Section 1272(e)(2) of the Surface Mining Act to restrict the petitioner's mineral rights as did Section 314 of the FLPMA in the *Locke* case. Thus, this case provides the Court with the opportunity to address and explain the limits of authority of an administrative agency under facts which present the other side of the ccin from the facts presented in *Locke.*

The claimant in *Locke* had merely a possessory right to mine federal lands acquired under Congressional authority. Section 314 declared, perhaps inartfully, but without apparent ambiguity or contrary legislative intent, that to protect the claim annual filings had to be made *prior to* December 31st of each year. The claimant in *Locke* filed *on* December 31st, and this Court held that, because of the late filing, Locke's claim was extinguished.[11] The Court further found no constitutional infirmities because the power to regulate "the 'character' of the property rights at issue" was "particularly broad." 105 S. Ct. at 1798.

The petitioners in this case have an absolute right to mine acquired not under a Congressional act but under deeds obtained by Stearns prior to 1937. Section 1272(e)(2) perhaps inartfully declares that no mining of federal minerals should occur except upon the conditions set forth therein. But if there is any ambiguity in Section 1272(e)(2), unlike the *Locke* case, pages and pages of legislative history support only

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[11]Except for the possibility of an estoppel claim to be considered on remand.

the conclusion that it does not apply, and was never intended to apply, to private mineral interests. Finally, in this case the character of the property right at stake is much different—a vested property right arising under private contract is deserving of far greater constitutional protection from regulation than a possessory interest in federal minerals arising solely as a result of a federal act.

There were basically *3* principles relied upon by the majority in *United States* v. *Locke:*

1. In construing a statute, a court should look first to its express terms, then to its legislative history, then to common law principles. 105 S. Ct. at 1792, 1793 and 1974.

2. A court will not pass on the constitutionality of an Act if a reasonable construction of the statute can avoid the constitutional question. 105 S. Ct. at 1791.

3. Congress can impose certain constraints on property rights "[a]s long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives." 105 S. Ct. at 1797-98.

The application of these principles to this case has been presented to the Court, *supra.* Suffice it to say that the language of Section 1272(e)(2), its legislative history, and common law property principles all mandate the conclusion that the section should not be held to apply to the petitioners' proposed mining activities.

It is interesting to note that while the approach utilized by the majority in *Locke* comports fully with the petitioners' position in this case, the gravamen

which compelled three justices to dissent in *Locke* is also present here. For example:

1. Justice Stevens notes that Section 314 is confusing at best and "creates a trap for unwary property owners." 105 S. Ct. at 1805. The same surely can be said of Section 1272(e)(2). Nothing in the language of the Section even remotely suggests a design on the part of Congress to regulate private mineral estates — and such an interpretation would surely create an unavoidable trap for the petitioners as well as many other mineral owners which will leave them owning minerals which they can neither mine nor sell.

2. Justice Stevens further notes that the language of Section 314 is "at best, 'the consequence of legislative *accident,* perhaps caused by nothing more than the unfortunate fact Congress is to busy to do all of its work as carefully as it should.' " *Id.* In this case, the language of Section 1272(e)(2) and the legislative history both indicate that only federally owned minerals were to be covered by its terms. What the language of Section 1272(e)(2) failed to declare explicitly was that it was *not* intended to regulate private mineral estates. However, it should not be incumbent upon Congress to declare every situation to which a provision does not apply in order to constrain a misinterpretation of the statute by overzealous administrators.

3. Finally, footnote 12 of Justice Stevens' dissent finds "a federal bureaucracy virtually running amok, and surely operating contrary to the intent of Congress,

by terminating the valuable property rights of hard-working, productive citizens of our country." 105 S. Ct. at 1808, fn. 12. The same can be said of this case—except that here the agency is not acting within the "letter" of the law, as was the agency in *Locke;* to the contrary, here OSM is attempting to expand the scope of Section 1272(e)(2) to embrace a situation totally beyond the terms of the statute.

The majority opinion in *Locke* fully supports the petitioners' arguments in this case. The principles relied upon there, when applied here, completely expose the weaknesses in the lower courts' opinions and justify review by this Court. The *Locke* opinion held that an agency can require owners of federal interests to fully comply with the letter of a federal law which legitimately furthers legislative objectives. The case at bar gives the Court the opportunity to set the parameters under which a federal agency may act when a Congressional act does *not* specifically embrace the private interest sought to be regulated, when the legislative history does *not* support the agency's interpretation, and when such interpretation would *not* further legitimate legislative objectives.

CONCLUSION

For the foregoing reasons, this Court is earnestly requested to grant a writ of certiorari in this case so that these critical and fundamental questions raised by the application of Section 1272(e)(2) to private mineral estates can be addressed and resolved by the highest court in the land.

Respectfully submitted,

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APPENDIX

APPENDIX 1

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5299
No. 83-5305

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION (83-5305), - *Plaintiffs-Appellants,*

and

THE STEARNS COMPANY (83-5299), - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of Interior;
PAUL REEVES, Acting Director;
ANDREW BAILEY, Acting Director, Office of Surface Mining Reclamation & Enforcement;
DAVID C. SHORT, Region II, Office of Surface Mining Reclamation & Enforcement, - *Defendants-Appellees.*

On Appeal From the United States District Court for the Eastern District of Kentucky.

Decided and Filed January 29, 1985

Before STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

MERRITT, Circuit Judge.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

In each of these two cases against the Secretary of the Interior, a coal mining company proposes to mine coal under the surface of land owned and maintained by the federal government as forest land. The mining company claims a valid royalty lease of the mineral estate from the successor in interest of the original owner who reserved the mineral estate when he sold the fee interest in the land to the government. Each case arises under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1983). In each, the coal mining company and the owners of the underlying royalty mineral interest seek from this Court a declaratory judgment that they are entitled to mine coal under the federal lands. In one case the coal underlies part of the Daniel Boone National Forest in Eastern Kentucky, and in the other case the land is part of the so-called "Redbird Purchase Unit" near the Daniel Boone National Forest. Plaintiffs do not seek injunctive relief or damages.[1]

The 1977 Act applies to mining on both public and private lands, but the questions of interpretation and application of the Act presented by plaintiffs here relate to one of the provisions applicable only to public lands, namely § 522(e)(2), codified as 30 U.S.C. § 1272(e)(2). That section provides, with certain exceptions which we need not enumerate here, that "subject to valid existing rights," no coal mining which disturbs the surface "shall be permitted

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[1]Plaintiffs originally sought an injunction prohibiting the Secretary from interfering with their mining operations, but have not pursued this remedy. Similarly, although plaintiffs have made a Fifth Amendment takings argument, they have not sought damages at this juncture.

. . . on any federal lands within the boundaries of any national forest . . . ."[2]

Plaintiffs request a declaratory judgment holding that section 1272(e)(2) is not applicable to the mines they intend to operate and hence that the Office of Surface Mining which administers the Act may not apply and enforce this section against them. They argue that section 1272(e)(2) does not regulate their proposed mines for the following reasons: (1) section 1272(e)(2) does not cover separate mineral interests owned by private parties under federal forests but covers only surface interests; (2) unless the section is read to exclude such private mineral estates, the section constitutes an unconstitutional taking under the Fifth Amendment; (3) the mineral estate underlying the government-owned "Redbird Purchase Unit" is not covered by section 1272(e)(2) because Redbird is not a national forest.

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[2]Section 1272(e) reads as follows:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted —
>
> > (1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System . . .;
> >
> > (2) On any federal lands within the boundaries of any national forest: *provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface mining operations and —
> >
> > > (A) Surface operations and impacts are incidental to an underground coal mine;
> > >
> > > . . . .

When the Office of Surface Mining learned that the two mining companies were about to conduct underground mining operations which would disturb the surface of federal lands, the administrator gave notice that the companies are required to seek and obtain permits under the Surface Mining Reclamation Act and would be subject to the provisions of section 1272(e)(2). When plaintiffs received these notices, they filed this action for declaratory judgment in District Court rather than participate in the administrative hearing process established by the Act. The Act prohibits the mining of coal without an administrative permit, 30 U.S.C. § 1256, and provides for administrative review and adjudication of disputes arising from permit applications. 30 U.S.C. § 1264.

The District Court overruled in part the government's motion to dismiss the complaints on grounds that plaintiffs had not exhausted their administrative remedies and that their cases were not ripe for decision. Instead, the Court rendered a partial declaratory judgment construing and applying the statute. It held that the companies' mineral interests and mining operations would operate under and on federal forest lands, and were therefore governed by section 1272(e)(2) of the Act. The District Court then agreed with the government's position regarding ripeness, and ruled that it would defer to the agency's primary jurisdiction regarding plaintiffs' further claims. However, upon motion filed by the plaintiffs, the District Court dismissed the cases in their entirety so that plaintiffs could appeal from the declaratory judgment. On appeal, the government has formally waived any exhaustion and ripeness contentions to the extent that they might be interpreted to interfere with the District Court's limited declaration, and asserts that the judgment is now ripe for decision by this Court.

Plaintiffs' first argument is that the Act, and specifically section 1272(e), does not apply to them at all, because their proposed mining operations will not occur "on federal lands." Their theory is that they still own the "lands" beneath the surface, and although the federal government has been granted some rights on the surface, the lands affected by plaintiffs' mining, including the surface land necessarily disturbed by their underground mines, are wholly owned by the private plaintiffs as a matter of state law. Proceeding from this premise, plaintiffs then claim that they cannot be made to resort to the administrative procedure that the Office of Surface Mining has set up for determination of "valid existing rights," because that process necessarily assumes that the plaintiffs' operations will occur "on federal lands."

Plaintiffs' proposal to mine beneath federal national forest lands, with the conceded attendant effects on the surface of those lands, fits squarely within the common sense meaning of the phrase "on federal lands" as used in section 1272(e)(2). This is even more apparent when the definition of "surface mining" contained in the Act, *i.e.*, "surface impacts incident to an underground mine," is substituted for the phrase "surface mining" in section 1272(e). Thus, the Act and section 1272(e) apply to plaintiffs' mines. The District Court was correct in so holding.

The plaintiffs' "taking" argument is governed by the Supreme Court's decision in *Hodel* v. *Virginia Surface Mining and Reclamation,* 452 U. S. 264 (1981), a pre-enforcement challenge to the Surface Mining Act. The Court held that the Act is not facially invalid. Its "mere enactment" does not constitute a taking of plaintiffs' mineral estate. Thus, the Court upheld the Act against the same type of attack under the Fifth Amendment as plaintiffs make in the instant case.

The Supreme Court observed that "the Act does not, on its face, prevent beneficial use of coal-bearing lands," and the coal companies "cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances" because "there is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative review," 452 U. S. 296-97. The Court explains the hypothetical nature of the "taking" claims before it—"if appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached"—and concludes that "the potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Id.* at 297 (footnote omitted). The same reasoning applies in this case. The Office of Surface Mining has not yet ruled on the questions of plaintiffs' "valid existing right" to engage in underground coal mining under section 1272(e)(2). Until an administrative disposition is made of this question, we will not know the nature of the restraint imposed by the government on plaintiffs' mining operations. Thus the District Court correctly ruled that plaintiffs' takings claim was not ripe for adjudication, and deferred to the agency's jurisdiction.

We agree with the District Court that lands within the Redbird Purchase Unit are "national forest" lands within the meaning of section 1272(e)(2). "National forest" land, primarily in the west, has been set aside for many years by the President from land in the public domain under section 24 of the Creative Act of 1891, 16 U.S.C. § 471. *See United States* v. *New Mexico*, 438 U. S. 696, 705 (1978). "National forest" land within the meaning of section 1272(e) has also been acquired, primarily in the eastern section of the United States, under section 11 of the Weeks Law of 1911, 16

U.S.C. § 521, which provides that land so acquired "shall be permanently reserved, held and administered as national forest land" just as are the western lands set aside by the President under the Creative Act of 1891. Land acquired as forest land under the Weeks Act, as distinguished from land set aside under the Creative Act of 1891, need not be formally set aside and proclaimed as national forest by the President. The acquisition of the land by the United States under the authority of the Weeks Act is sufficient to designate it as "national forest."

The "Redbird" Forest in question here is a so-called "purchase unit" acquired, held and administered as "national forest" land under the Weeks Act. The District Court was therefore correct in holding that section 1272(e) regulating coal mining in national forests governs lands within the Redbird Purchase Unit.

Accordingly, the judgment of the District Court is affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

APPENDIX 2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION - - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

MEMORANDUM — Filed November 3, 1981

These matters are before the Court on various motions of the parties: the federal defendants' April 27, 1981, and May 5, 1981, motions to dismiss, their August 6, 1981, motions for summary judgment, and their August 10, 1981, motion to dismiss the intervening complaint in London Civil No. 81-12; Ramex Mining Corporation's ("Ramex's") May 21, 1981 (motion for summary judgment in London Civil No. 81-12; Stearns Coal and Lumber Company's ("Stearns' ") August 14, 1981, motion for summary judgment in London Civil No. 81-12; and Gabriel Energy Corporation's ("Gabriel's") May 26, 1981, motion for summary judgment and its August 13, 1981, motion to amend its complaint, both in London Civil Action No. 81-18. With the

exception of Gabriel's August 13 motion to amend its complaint, all the pending motions are controverted. Fortunately, in ruling on these motions, chaos may be avoided, for the arguments are severally repeated throughout the pleadings. The Court has extracted the principal arguments from the various pleadings in this Memorandum, and disposes of them in a slightly-different order than that suggested to the Court by the parties. After a review of the record and the pleadings of counsel, the Court concludes that it has jurisdiction in these matters, that the federal defendants are entitled to partial summary judgment, and that the Court should retain jurisdiction pending administrative proceedings before the Office of Surface Mining Reclamation and Enforcement ("OSM"). Since no party has objected, Gabriel will be permitted to file its tendered amended complaint. Appropriate Orders will be entered this date.

The sole issue for resolution in both matters is whether an operator seeking to mine coal pursuant to a privately held mineral estate underlying a federally owned surface estate in a national forest is conducting a surface coal mining operation on federal lands within the meaning of Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e).

I. JURISDICTION OF THIS COURT

A. *Statutory Preclusion of Judicial Review.*

The federal defendants contend that this Court lacks subject matter jurisdiction because Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), requires that this litigation be brought in the United States District Court for the District of Columbia, within 60 days after the alleged injuries, by plaintiffs who participated in the administrative process. Section 526(a)(1) is plainly ap-

plicable to any litigant seeking judicial review of the promulgation of national rules and regulations pertaining to either surface mining operations or the impacts incident to underground mining operations on federal lands. The plaintiffs' complaints and pleadings, however, evidence that the plaintiffs are not challenging either the Secretary's authority to promulgate national rules and regulations pertaining to federal lands or the validity of those regulations; rather, the plaintiffs contend simply that their private mineral estates and mining operations are not subject to the federal lands provisions of the Surface Mining Act, 30 U.S.C. §§ 1272, 1273. Since the plaintiffs are challenging the *applicability* of the federal statute and not the *validity* of the federal regulations promulgated thereunder, the Surface Mining Act's preclusion of judicial review, 30 U.S.C. § 1276(a)(1), is wholly inapplicable. Subject matter jurisdiction and venue are properly laid in the Eastern District of Kentucky. 28 U.S.C. §§ 1331, 1391(e).

The federal defendants are mistaken in their contention that the distinction between applicability and validity of federal statutes and regulations is wholly illusory. Under § 701(a)(1) of the Administrative Procedures Act, 5 U.S.C. § 701(a)(1), an agency's decisions are not reviewable when a statute precludes judicial review. Application of Section 701(a)(1) is contrary to the general constitutional presumption of reviewability of administrative action. *See, e.g., Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 289-91 (1978) (Powell, J., concurring). Where an agency is alleged to be acting outside of its mandate and the organic legislation establishing the agency also contain a statutory preclusion or limitation of judicial review, the aggrieved party has no remedy to challenge the applicability of federal regulation, unless a federal judicial forum construes the statute precluding judicial review as inapplicable. In *Adamo Wrecking Co.* v. *United States, supra,*

the Supreme Court was faced with the distinction of the applicability and the validity of federal regulations. The Court concluded that Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), the federal provision precluding judicial review under the Clean Air Act, did not apply to restrict the jurisdiction of a federal district court to determine whether federal regulation applied to the defendant's conduct in a criminal prosecution. *Id.* at 285. The Court explicitly cautioned federal district courts to avoid engaging in judicial review in a manner precluded by statutory restrictions in the organic legislation under the guise of making a determination of the applicability of federal regulation. *Id.* As the Supreme Court in *Adamo Wrecking* indicated, the distinction between the applicability and the validity of federal regulation is not illusory, and with due regard to the Supreme Court's admonition, this Court is not precluded by Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), from exercising jurisdiction in these matters.

B. *Doctrine of Exhaustion of Remedies.*

The federal defendants contend that this Court should refrain from exercising jurisdiction in this litigation for jurisprudential considerations. They argue that the controversy is not justiciable because the plaintiffs have failed to avail themselves of all possible administrative remedies of an adverse administrative determination prior to seeking judicial review. The plaintiffs concede that they have not attempted to avail themselves of any administrative remedies to resolve these matters, but argue that the jurisprudential considerations inherent in the doctrine are irrelevant to this litigation. The plaintiffs further argue that they are under no duty to exhaust their administrative remedies because, under their interpretation of the Surface Mining Act, the agency proferring relief, OSM,

has exceeded its authority delegated to it by Congress. Plaintiffs contend it is futile for them to exhaust administrative remedies before OSM, for OSM has already determined that the plaintiffs are subject to their federal regulation pertaining to national forests. OSM's previous determination is the ultimate issue in this litigation, and that issue is currently before the Court.

It is unnecessary for the Court to determine whether the plaintiffs are under a duty to exhaust administrative remedies prior to the inception of this litigation or whether an exhaustion requirement is futile herein, for the general doctrine of exhaustion of administrative remedies before an administrative agency is subject to an exception where the principal question is solely of statutory interpretation. *McKart* v. *United States*, 395 U. S. 185, 197-99 (1969); *Frontier Airlines, Inc.* v. *CAB*, 621 F. 2d 369, 371 (10th Cir. 1980). None of the jurisprudential considerations urging restraint from the exercise of jurisdiction are applicable. The resolution of the applicability of the Surface Mining Act to the mineral estates of Ramex, Stearns, and Gabriel does not require any particular expertise unique to the OSM. *McKart* v. *United States*, *supra* at 198. Judicial review would not be significantly aided by any additional administrative proceedings. *Id.* at 199. Indeed, if the plaintiffs were required to pursue administrative proceedings before OSM without accruing the desired results and thereafter successfully demonstrated the inapplicability of federal regulation, the plaintiffs would suffer needless litigation expenses in the interim prior to a judgment in this forum. As in *McKart* v. *United States*, *supra*, there is simply no overwhelming reason for this Court to have OSM determine in the first instance whether the plaintiffs' mining operations in the Daniel Boone National Forest are subject to the Surface Mining Act.

C. *Ripeness of Compensatory Claims.*

The federal defendants contend that the plaintiffs' claims for just compensation for a deprivation of property are not ripe for adjudication. The plaintiffs concede the defendants' contention, but assert that their claims for declaratory and injunctive relief are ripe. The Court concludes that the claims for declaratory and injunctive relief are ripe, and agrees with the parties that the claims for compensation have not as yet matured. *See Hodel* v. *Virginia Surface Mining and Reclamation Association,* ___ U. S. ____, 49 U.S.L.W. 4654, 4661-62 (1981).

II. STATUTORY AUTHORTIY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS.

The task of a Court to determine whether a particular party's activity is subject to federal statutory regulation is relatively narrow. *Adamo Wrecking Co.* v. *United States, supra* at 285. The Court must first establish that Congress has the constitutional authority to regulate the specific challenged conduct. Then, the only remaining question for judicial inquiry is whether Congress has in fact chosen to regulate the specific challenged conduct. With respect to constitutional authorization, whatever doubts remain as to the constitutionality of the Surface Mining Act were laid to rest in *Hodel* v. *Virginia Surface Mining, supra,* wherein the Supreme Court concluded that Congress had not exceeded its authority under the Commerce Clause in enacting the Surface Mining Act. Both in *Hodel* v. *Virginia Surface Mining, supra, and in Hodel* v. *Indiana,* ___ U. S. ___, 49 U.S.L.W. 4667 (1981), the Supreme Court rejected broad constitutional challenges to the Act as violative of the Fifth and Tenth Amendments. Those decisions establish that Congress has the authority to enact the Surface

Mining Act, and, in particular, surface mining activities within federal lands, 30 U.S.C. §§ 1272, 1273.

It is the conclusion of this Court that Congress has chosen to regulate the conduct at issue. Section 522(e) of the Act prohibits new surface coal mining operations on federal lands within the boundaries of a national forest except where the operator can show a valid existing right to mine as of August 3, 1977. Plaintiffs contend that the regulations and requirements imposed upon "federal lands" does not apply to their interests as they own private mineral estates. If the plaintiffs were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiffs' arguments and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and this disruption is what the Act is designed to regulate. This is reflected in Section 101(c) of the Act, 30 U.S.C. § 1201(c), which states:

> Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

It appears that Congress recognized that in many instances private proprietary interests would underlie federal lands subject to the Act in issue. The legislative history of this Act demonstrates the intent of Congress to address the interests of private mineral estate holders. As stated in a Senate report concerning this Act:

> Since the mining of coal became a profitable enterprise, there have been numerous instances in which the mineral estate and the surface estates were separated, both on public and private lands. State law governs the resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such state laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights.

S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977). While the Act reflects the desire of Congress that, in most instances, mining should not take place on federal lands, an exception was provided to take into account those persons who had valid existing rights in private mineral estates lying below "federal lands." 30 U.S.C. § 1272(e). Based upon the above discussion, it is clear that the Act in issue, as it regulates mining activities on "federal lands," should be interpreted to include regulation of those private parties who seek to mine their mineral estates underlying the national forests.

All plaintiffs are declared to be conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine.

III. DEFERENCE TO THE PRIMARY JURISDICTION.

Having concluded that the plaintiffs seeking to mine coal pursuant to a privately held mineral estate underlying the federally owned surface estate in the Daniel Boone National Forest are conducting a surface coal mining operation on federal lands within the meaning of Section 522(e), 30 U.S.C. § 1272(e), any further inquiry into these matters, the extent and nature of federal regulation by the OSM, is precluded by the doctrine of primary jurisdiction. The doctrine applies whenever the enforcement of claims, originally cognizable in a federal forum, requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative agency. *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, 63-64 (1956). "[I]n such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64 (citation omitted). This litigation concerns complicated issues of fact which are not within the conventional experience of the federal judiciary. The OSM should not be passed over, for it may provide the "[u]niformity and consistency in the regulation" of surface mining activities within the national forests. *Far East Conference* v. *United States,* 342 U. S. 570, 574 (1952). The OSM is far better equipped than this Court to ascertain and interpret the extent and validity of the plaintiff's existing rights to conduct mining operations in the Daniel Boone National Forest. This Court, however, will not sustain the federal defendants' motion in full, for if OSM's regulation of the plaintiffs' mining operations is so oppressive as to amount to a deprivation of their property interests, their Fifth Amendment claims for just compensation may become ripe for adjudication. *See Hodel* v. *Virginia Surface Mining, supra* at ...., 49 U.S.L.W. at 4661-62.

In making this ruling, the Court is making no decision as to whether underground mining would so disturb the surface as to be incompatible with the goals set out in 30 U.S.C. § 1272(e), as there have been numerous underground mines in the national forest in this area in the past.

As the orders in these cases will not be final and thus not appealable, if any party desires the Court to amend its Orders to make a finding under 28 U.S.C. § 1292(b), such a motion will be given serious consideration.

This 3rd day of November, 1981.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

APPENDIX 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

MEMORANDUM — Filed April 1, 1983

This matter is currently before the Court for consideration of the motion by the plaintiff, Gabriel Energy Corporation (hereinafter Gabriel), for reconsideration of the Court's Order entered November 3, 1981, whereby the defendants were granted partial summary judgment. After thorough consideration, the Court is of the opinion that its previous Order was proper and should stand. An appropriate Order denying the relief requested by the plaintiff will be entered this date. Various other motions filed on behalf of Walter Fitzmartin, Jane Fitzmartin, Herman Israel, and Yvonne O'Brien, executrix of the estates of

John F. R. Clark and Madeline Clark, and the responses thereto, will also be considered below.

In response to Gabriel's request for prompt action in this matter, this Court on November 3, 1981, addressed itself to the central issue raised by the parties. While the Court was concerned with the parties' need and desire for a quick resolution, it was also aware of the importance and long-ranging effect its decision would have. Unfortunately, over a year later the major issue raised by this matter has not been finally adjudicated.

The portion of the Court's previous opinion to which Gabriel has strenuously objected is contained within the section entitled "STATUTORY AUTHORITY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS." Specifically, the plaintiff finds exception with the Court's following statement:

> If the plaintiff were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiff's argument and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and that disruption is what the Act is designed to regulate.

This statement should in no way be construed to mean that the government, by virtue of its ability to regulate mining activities on federal lands, will be able to preempt totally the plaintiff's rights in the mineral estate once valid rights are established through appropriate administrative procedures. However, at this juncture of this prcoeeding, that issue is not ripe for consideration.

The ability of the government to regulate mining activities which have an impact on federal lands within the boundaries of national forests evolves from the authority

of the Surface Mining Control and Reclamation Act of 1977 (hereinafter Act) and *not necessarily* by virtue of the fact that the government holds the interest of the surface estate which it seeks to regulate. In previously addressing this issue, Gabriel has amply set forth the law relevant to the rights held by the owner of a mineral estate as compared with the rights held by the owner of the surface estate. The Court's holding that this regulation is binding on the owner of private mineral estates, encompassing both rights on the surface and the underlying strata, does not beg the question as the plaintiff suggests. The central question becomes not whether the interest in the private mineral estate is dominant to that of the owner of the surface estate but whether the government has chosen to regulate mining upon or beneath the surface in question. After careful consideration, the Court has determined that the Act does indeed regulate such mining activity and that the definition of federal lands contained within the Act is consistent with such regulation. The legislative history of the Act supports such a finding. While the Act should not be construed to extinguish existing property rights, the government's ability to regulate as prescribed within the Act may not be ignored.

OTHER PENDING MOTIONS

On July 30, 1982, a hearing was held in this matter to allow all parties the opportunity to summarize their arguments regarding the plaintiff's motion for reconsideration. After hearing all parties, the Court granted counsel for *Amici Curiae* an additional period of five days to supplement their argument. The federal defendants were given ten days thereafter in which to advise the Court of their position as to the suggestion by Gabriel that the complaint be dismissed so that it may appeal the dispositive issue to the United States Court of Appeals for the Sixth Circuit.

Following the hearing, the *Amici Curiae* were joined as parties-plaintiff in this action (hereinafter plaintiff mineral owners). Thereafter, the following motions and responses were filed by the respective parties:

Motion for Extension of Time in which to File Supplement to the Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by the plaintiff mineral owners on August 13, 1982);

Motion to Join Parties Defendant (filed by the plaintiff mineral owners on August 13, 1982);

Request for Ruling and Judgment on Dispositive Issues in Consolidated Case (filed by the plaintiff mineral owners on August 13, 1982);

Objection to Plaintiff Mineral Owners' Motions and Request (filed by Gabriel on August 17, 1982);

Motion to Reset Time for Extension of Time for Submission of Motion for Reconsideration of Order (filed by plaintiff mineral owners on August 19, 1982);

Objection to Plaintiff Mineral Owners' Motions and Requests or Alternatively Motion for Time to Respond (filed by federal defendants on August 19, 1982);

Objection to Motion to Reset Time, etc., and Motion to Close the Record to Deny Further Filings (filed by Gabriel on August 29, 1982);

Motion to Amend Motion for Extension of Time in which to File Supplement to Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by plaintiff mineral owners on October 29, 1982); and

Motion for Extension of Time in which to File Response to Objection of Federal Defendants to Plaintiff Mineral Owners' Motion and Requests and Response

to Objections of Gabriel to Motion and Request and Motion to Reset Time, etc., and Motion (filed by plaintiff mineral owners on October 29, 1982).

Initially, the Court must note that it does not look with favor upon the delays which have resulted from the various late filings by the plaintiff mineral owners. However, after reviewing these materials, the Court concludes that none of the parties herein will be prejudiced by allowing the materials submitted by the plaintiff mineral owners to be considered. For the sake of clarity and brevity, all materials heretofore tendered by the plaintiff mineral owners will be allowed to be filed. Objection to these materials by the remaining parties will be overruled. Further, the Court does not deem it necessary to require the remaining parties to address any new matter which may have been raised by these materials. Therefore, the Court will proceed to address the issues raised by the plaintiff mineral owners.

Before considering the gravamen of the plaintiff mineral owners' supporting authority, the Court will address the motion to add additional defendants. After reviewing the materials submitted by the parties in regard to this issue, the Court finds the plaintiff mineral owners' motion to add additional defendants to be improper. The movant has not shown to the satisfaction of the Court that the failure to add the Secretary of the Department of Agriculture and the Chief of the Forest Service will impair or impede the parties' ability to protect their respective interests or subject any party to a substantial risk of an inconsistent obligation. Rule 19(a), Fed. R. Civ P. Thus, the motion to add additional defendants to this action will be denied.

As set forth in the affidavit of counsel for the plaintiff mineral owners, their interest in this litigation arises by

virtue of the fact that they own in fee simple the mineral estate in approximately 9,000 acres of land wherein the surface estate is owned by the United States. These 9,000 acres are located within the Redbird Purchase Unit, although not specifically designated as a part of the Daniel Boone National Forest. The crux of their argument centers on the issue of whether purchase units should be considered as being included within the definition of national forests as set forth in section 522(e) of the Act, 30 U.S.C. § 1272(e). The Court has reviewed the materials submitted by the plaintiff mineral owners and finds much of it to be inconclusive as to the issue herein being considered. A review of the legislative history and the various enactments creating and affecting the national forest lands convinces the Court that the position set forth and argued by the plaintiff mineral owners is erroneous.

The Court is also unpersuaded by the plaintiff mineral owners' argument that, inasmuch as the various agencies of the defendants have made a distinction, via their regulations, between national forests and purchase units, they are now bound by their regulations, citing inter alia, *United States* v. *Nixon,* 418 U. S. 683 (1974). The Court has reviewed this issue and finds that the differences which exist are merely for administrative convenience and do not alter the intent of Congress.

In pertinent part, section 522(e) of the Act provides:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . . (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* that surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values

which may be incompatible with surface mining operations. . . .

30 U.S.C. § 1272(e). Examination of the legislative history of this section is relevant in resolving the issue herein being raised by the plaintiff mineral owners. The Conferees' Report states at Cong. Rec. 38281 (Dec. 5, 1974):

> 7. Designation of Areas Unsuitable for Surface Coal Mining.—Both the Senate bill and House amendment provide for the establishment of a process by which regulatory authority could designate land areas as unsuitable for the surface mining of coal. In addition to the prohibition of surface mining which may result from the operation of the designation process, certain outright prohibitions were included in the Senate bill and House amendment. Thus both the Senate bill and House amendment would prohibit new surface coal mining operations on lands within the National Park System, the National Wilderness Preservation System and the House amendment contained additional bans applicable to the National Forest System (including national grasslands) and alluvial valley floors.
>
> The conferees adopted certain of the statutory prohibitions (e.g., lands within the National Park System, National Wildlife Refuge System, National Wilderness System), and modified others (rejected the prohibition applicable to national grasslands but retained a ban on National Forests). . . .

Although this proposed Act eventually received a presidential veto, the prohibitions contained in the 1977 Act are the same. The intention of Congress clearly appears to be the protection of all areas of the National Forest System with the exclusion of the national grasslands. This intent would

be frustrated were the Court to adopt the meaning urged by the plaintiff mineral owners. The term National Forest System has been defined by the plaintiff mineral owners as follows:

> All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and Land Utilization Projects administered under Title III of the Bankhead-Jones Farm Tenant Act (citations omitted) and other lands, waters, or interests therein which are administered by the Forest Services or are designated for administration through the Forest Service as a part of the system.

This definition, taken from Forest Service Manual 5405.4 is also included within the definition cited by the defendants taken from the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended, 16 U.S.C. § 1609(a). Either definition is broad enough to include purchase units which were acquired pursuant to the Weeks Act of 1911. Therefore, even if national grasslands are excluded from coverage as reflected by congressional intent, purchase units remain and are protected by section 522(e).

Additionally, unlike purchase units which may, in time, be designated as a specific national forest, national grasslands do not have national forest status. While they are administered by the Forest Service and are a part of the National Forest System, their acquisition arose from the Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010. Contrary to the Weeks Act which has as a primary purpose proper timber management and protection of waterways and watersheds, the Bankhead-Jones Farm Tenant Act was designed primarily to restore soil management and prevent soil erosion in areas of the Midwest and Great Plains which

had resulted from improper land use. While exclusion of national grasslands from section 522(e)(2) of the Act does not frustrate the intent of the Act, exclusion of purchase units from this same section would frustrate the intention of the Weeks Act as well as the Surface Mining Control and Reclamation Act of 1977.

Based upon a plain reading of the statutory section as well as its underlying legislative history, the Court finds that areas designated as purchase units come within the meaning of national forests as set forth in section 522(e)(2) of the Act. Further, after considering all parties' respective position regarding dismissal of this action so that an appeal may be taken and finding the issues considered herein to be dispositive, this matter will be dismissed this date by separate Order, as the Court finds that the plaintiffs are conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine. Moreover, in accordance with the oral motion by the plaintiff, judgment will be entered denying the plaintiffs' claims of a taking, as they are not ripe for adjudication. *Hodel* v. *Virginia Surface Mining,* 452 U. S. 264 (1981).

This 1st day of April, 1983.

(s) Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION, - - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of the Interior,
Et Al., - - - - - - - - - *Defendants.*

GABRIEL ENERGY CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of the Interior,
Et Al., - - - - - - - - - *Defendants.*

JUDGMENT — Filed April 1, 1983

In accordance with the Order of even date, it is hereby ORDERED AND ADJUDGED:

That this matter be and is DISMISSED and stricken from the docket of this Court.

This 1st day of April, 1983.

(s) Eugene E. Siler, Jr., Judge

APPENDIX 4

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION
(83-5305), - - - - - *Plaintiffs-Appellants,*

THE STEARNS COMPANY
(83-5299), - - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of
Interior, et al., - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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JUDGMENT—Filed January 29, 1985

Before: STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

It is further ordered that Defendants-Appellees recover from Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John P. Hehman, Clerk

Issued as Mandate: March 25, 1985

Costs: None

Filing fee .....$
Printing .....$
Total .....$

A True Copy

Attest:

(s) Nancy Schulkens
Deputy Clerk

APPENDIX 5

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION, Et Al., - - *Plaintiffs-Appellants,*

v.

JAMES G. WATT, Secretary of the Interior, Et Al., - - - - - - - - - *Defendants-Appellees.*

ORDER — Filed March 15, 1985

BEFORE: STEWART, Associate Justice (Ret.)*, ENGEL and MERRITT, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

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*Hon Potter Stewart sitting by designation from the Supreme Court of the United States.

APPENDIX 6

TEXT OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, United States Constitution, Article I, Section 8, Clause 3 reads as follows:

> The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Property Clause, United States Constitution, Article IV, Section 3, Clause 2 reads as follows:

> The Congress shall have power to dispose of and make all needful rules and regulations affecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

30 U.S.C. § 1272(e)(2) reads in pertinent part as follows:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted —
>
> . . . .
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and —
>
> (A) surface operation and impacts are incident to an underground coal mine; . . . .

30 U.S.C. § 1291(4) reads in pertinent part as follows:

> (4) "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands: . . . .